EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(3)

No. 90-955

In The

Supreme Court of the United States

OCTOBER TERM, 1990

ALMONT SHIPPING COMPANY, INC.,
Petitioner,

v.

PETER BROWNE RUFFIN; WARD KING; JOHN E. DYER; WILLIE SLOAN; WILLIAM PINER; HENRY ARRON ROSE, IN THEIR CAPACITIES AS TRUSTEES FOR THE EMPLOYERS-ILA PENSION, WELFARE & VACATION FUND FOR THE NORTH CAROLINA PORTS AREA,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF PRESTON TRUCKING COMPANY, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER ALMONT SHIPPING COMPANY, INC.

JONATHAN D. SMITH,
PIPER & MARBURY,
36 South Charles Street,
Baltimore, Md. 21201-3010,
(301) 539-2530,
Attorney for Preston
Trucking Company, Inc.

The Daily Record Company
11 East Saratoga Street, Baltimore, MD 21202 – (301) 752-3849

TABLE OF CONTENTS

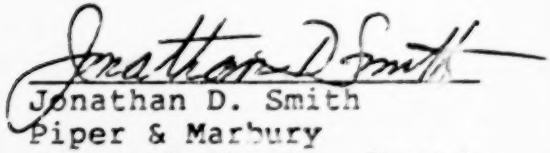
MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF IN
SUPPORT OF PETITIONER
ALMONT SHIPPING COMPANY, INC.

Pursuant to Rules 21 and 37.6 of the Rules of the Supreme Court of the United States, Preston Trucking Company, Inc. ("Preston Trucking") moves for leave to file the attached amicus curiae brief in support of Almont Shipping Company, Inc. ("Almont")'s Petition for Certiorari. The respondents to Almont's petition have not consented to the filing of this amicus curiae brief.

As is set forth more fully in Preston Trucking's accompanying Statement of Interest, Preston Trucking is subject to two conflicting interpretations of its obligations under the Multiemployer Pension Plan Amendment Act of 1980, 29 U.S.C. § 1381

et seq. Given its practical involvement in this issue, Preston Trucking respectfully submits that its views would be helpful to the Court in determining whether Almont's Petition for Certiorari should be granted.

Respectfully submitted,



Jonathan D. Smith
Piper & Marbury
36 South Charles Street
Baltimore, Md. 21201
(301) 539-2530

Attorney for Preston
Trucking Company, Inc.

TABLE OF AUTHORITIES

No. 90-955

In The

Supreme Court of the United States

OCTOBER TERM, 1990

ALMONT SHIPPING COMPANY, INC.,

Petitioner,

v.

PETER BROWNE RUFFIN; WARD KING; JOHN E. DYER; WILLIE SLOAN; WILLIAM PINER; HENRY ARRON ROSE, IN THEIR CAPACITIES AS TRUSTEES FOR THE EMPLOYERS-ILA PENSION, WELFARE & VACATION FUND FOR THE NORTH CAROLINA PORTS AREA,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF PRESTON TRUCKING COMPANY, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER ALMONT SHIPPING COMPANY, INC.

QUESTION PRESENTED

The question presented in this case is whether withdrawal liability (the employer's proportionate share of the plan's unfunded benefits) may be assessed under the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1381 et seq. (MPPAA or "the Act") against an employer who withdraws from a plan whose vested benefits are fully funded.

STATEMENT OF INTEREST OF PRESTON TRUCKING COMPANY, INC. AS AMICUS CURIAE

Preston Trucking, a motor common carrier of general commodities, maintains its headquarters in the State of Maryland. It is authorized to operate in every state of the country, and is now active in 22 states.

Preston Trucking contributes to 27 multiemployer pension plans covering 3,109 employees in these 22 states. Some of these states are in the First Circuit, and thus subject to the First Circuit's decision in Berkshire Hathaway Inc. v. Textile Workers Pension Fund, 874 F.2d 53 (1st Cir. 1989), regarding withdrawal liability under MPPAA; some are in the Fourth Circuit, and thus subject to the Fourth Circuit's recent decision in Wise v.

Ruffin, 914 F.2d 570 (4th Cir. 1990) on this question; and some are in circuits in which this issue has not been addressed. Preston Trucking is thus subject to conflicting determinations with respect to its obligations under MPPAA.

SUMMARY OF ARGUMENT

A conflict exists between the Court of Appeals for the Fourth Circuit and the Court of Appeals for the First Circuit regarding the issue of whether withdrawal liability can be assessed against an employer that withdraws from a multiemployer pension plan if the plan has no unfunded vested benefits as of the last day of the plan year preceding the date of the employer's withdrawal from the plan. The

applicable statutory provisions which govern the determination of withdrawal liability do not clearly answer this question. Thus, the First Circuit, in Berkshire, correctly looked to the legislative history of the applicable statutory provisions and to the Pension Benefit Guaranty Corporation's interpretation of the statutory provisions to conclude that withdrawal liability could not be assessed under these circumstances. The Fourth Circuit, in Wise, erroneously concluded that the applicable statutory provisions clearly answered this question and concluded that withdrawal liability can be assessed under these circumstances.

ARGUMENT

I. THE FOURTH CIRCUIT'S DECISION IN WISE REGARDING WITHDRAWAL LIABILITY UNDER MPPAA IS IN DIRECT CONFLICT WITH THE FIRST CIRCUIT'S DECISION IN BERKSHIRE

The recent Fourth Circuit decision in Wise is in direct conflict with the First Circuit's decision in Berkshire. Both decisions address the issue of whether withdrawal liability can be assessed against an employer that withdraws from a multiemployer pension plan if the plan has no unfunded vested benefits as of the last day of the plan year preceding the date of the employer's withdrawal from the plan.

Sections 4201-4225 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1381-1405, which were added to ERISA by the Multiemployer Pension Plan Amendments Act of 1980

("MPPAA"), are the statutory provisions which govern the determination of withdrawal liability. Section 4201 of ERISA establishes withdrawal liability by providing:

> If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable under this part to be the withdrawal liability.

29 U.S.C. § 1381(a). Withdrawal liability is determined by first computing the amount of unfunded vested benefits allocable to the withdrawing employer under the appropriate method under ERISA § 4211, 29 U.S.C. § 1391, and then adjusting that amount to the extent provided in ERISA §§ 4209, 4206, 4219 and 4225, 29 U.S.C. §§ 1389, 1386, 1399 and 1405. Thus, withdrawal liability is determined by application

of several statutory provisions and is not limited to the application of the applicable method for determining unfunded vested benefits allocable to the employer under ERISA § 4211, 29 U.S.C. § 1391.

In Berkshire, the fund trustee applied a strict reading of ERISA § 4211(c)(4)(B), 29 U.S.C. § 1391(c)-(4)(B), and argued that this statutory provision required the assessment of withdrawal liability against a withdrawing employer if the employer's contribution did not fund the benefits of that employer's participating employees, even if the fund, in the aggregate, was completely funded, and therefore had no unfunded vested benefits as of the last day of the plan year preceding the date of the

employer's withdrawal from the plan. The Court of Appeals for the First Circuit in Berkshire rejected the fund trustee's argument and concluded that the statutory provisions for the direct attribution allocation method of computing withdrawal liability in ERISA § 4211(c)(4), 29 U.S.C. § 1391(c)(4), do not clearly answer the question of whether withdrawal liability could be assessed against a withdrawing employer if the plan had no unfunded vested benefits as of the last day of the plan year preceding the date of the employer's withdrawal from the plan. Therefore, the court looked to the legislative history of MPPAA and to the Pension Benefit Guaranty Corporation's ("PBGC") interpretation of the statutory provisions with respect to

this issue in PBGC Notice of Interpretation, 51 Fed. Reg. 47,342 (1986) ("1986 PBGC Notice"). The court determined that the 1986 PBGC Notice must be given deference and concluded that a withdrawing employer could not be assessed withdrawal liability unless the plan, in the aggregate, had unfunded vested benefits as of the last day of the plan year preceding the date of the employer's withdrawal.

The 1986 PBGC Notice reviewed all of the statutory methods under ERISA § 4211, 29 U.S.C. § 1391, for determining the allocation of unfunded vested benefits to a withdrawing employer. The 1986 PBGC Notice is not limited to a review of ERISA § 4211 only. Rather, the PBGC reviewed all of the statutory provisions for

determining withdrawal liability and concluded that when all of the statutory provisions are read together, the statute is ambiguous with respect to the issue of whether withdrawal liability can be assessed if the plan has no unfunded vested benefits as of the last day of the plan year preceding the date of the employer's withdrawal. The PBGC interpreted the ambiguity by looking for the legislative history of MPPAA and concluded that no withdrawal liability can be assessed in such a case, because to do otherwise would violate the purpose of the statute as evidenced by the legislative history. The PBGC expressly stated that the conclusions expressed in the 1986 PBGC Notice apply to all of the methods under ERISA § 4211, 29 U.S.C. § 1391,

for determining the allocation of unfunded vested benefits to a withdrawing employer.

The Court of Appeals for the Fourth Circuit in Wise was faced with the application of the modified presumptive method of determining withdrawal liability under ERISA § 4211(c)(2), 29 U.S.C. § 1391(c)(2)). Under this method, the determination of an employer's allocable unfunded vested benefits, which is the first step in determining withdrawal liability, is a two-part determination. The first part of this determination was at issue in Wise. This first part provides that the employer's allocable amount of unfunded vested benefits is the product of:

> (i) the plan's unfunded vested benefits as of the end

> of the last plan year ending before September 26, 1980, reduced as if those obligations were being fully amortized in level annual installments over 15 years beginning with the first plan year ending on or after such date; mutilplied by
>
> (ii) a fraction . . .

29 U.S.C. § 1391(c)(2)(B).

The court in Wise limited its focus to this particular provision of the statute and did not review all of the statutory provisions for determining withdrawal liability. The court concluded that ERISA § 4211(c)(2)(B), 29 U.S.C. § 1391(c)-(2)(B), was clear and did not need further interpretation, that the PBGC's contrary interpretation of this issue was to be accorded no deference, and that a review of the legislative intent was not necessary. As a result,

the court concluded that withdrawal liability could be assessed even if the plan had no unfunded vested benefits as of the last day of the plan year preceding the date of the employer's withdrawal.

The decision in Wise is in direct conflict with the decision in Berkshire. Both courts were faced with the identical question of whether withdrawal liability can be assessed against an employer that withdraws from a multiemployer pension plan if the plan has no unfunded vested benefits as of the last day of the plan year preceding the date of the employer's withdrawal from the plan. The courts reached markedly different conclusions.

II. THE FOURTH CIRCUIT'S DECISION IN WISE WAS ERRONEOUS AND SHOULD BE REVERSED.

The court in Berkshire correctly did not limit its determination regarding this question solely on the interpretation of a single subsection of ERISA § 4211, 29 U.S.C. § 1391. Rather, the court determined that the withdrawal liability statutory provisions, in the aggregate, do not clearly answer this question and that the PBGC interpretation of the statutory provisions regarding this question must be given deference. Thus, the Berkshire court correctly held that withdrawal liability cannot be assessed.

The court in Wise erroneously limited its determination regarding this question solely on the

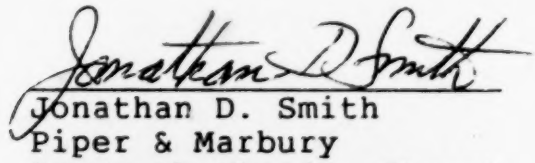
interpretation of a single subsection of ERISA § 4211, 29 U.S.C. § 1391, and concluded that the statutory provision was clear. Thus, the court erroneously determined that the PBGC interpretation of the statutory provisions regarding this question must be given no deference and that withdrawal liability can be assessed.

CONCLUSION

Preston Trucking urges this Court to grant Almont's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. Preston Trucking further urges this Court to reverse the decision of the Fourth Circuit in Wise

and to support the decision of the First Circuit in Berkshire.

Respectfully submitted,



Jonathan D. Smith
Piper & Marbury
36 South Charles Street
Baltimore, Md. 21201
(301) 539-2530

Attorney for Preston
Trucking Company, Inc.